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No. 1067

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

The People of the State of Illinois on the relation of ROBERT H. ENGLE,

Appellants,

vs.

OTTO KERNER, et al., Members of the Illinois State Electoral Board,

Appellees.

An Appeal from the Supreme Court of the State of Illinois

Petition for Rehearing

~~BRIEF FOR APPELLANTS~~

ROBERT H. ENGLE, Pro se
5838 South Stony Island Avenue
Chicago, Illinois, 60637
DOrchester 3-4622

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OPINIONS BELOW

The opinions of the Illinois Supreme Court with federal questions appealed here are given in the Jurisdictional Statement Appendix, B, D, and H. The motions involving

the questions presented, all denied without comment or without prejudice, are quoted in the text where they are germane.

JURISDICTION

This is an appeal from the highest court in Illinois under the provisions of 28 U.S.C. 344, and 28 U.S.A. 1257 (2). The texts of the United States Constitution involved are:

> Article IV-4, The United States shall guarantee to every State in this Union a Republican Form of Government, . . .
>
> Amendment XIV-1, . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws.

The Illinois Supreme Court still has retained jurisdiction in this case and has announced that this is to last until the 1970 census figures are available for legislative action. The latest Court action is the confirming judgment of the Three-Judge United States District Court of Northern Illinois, Eastern Division, dated 12 October 1965.

QUESTIONS PRESENTED

1. Whether the mandatory and unnecessary postponement of decennial reapportionments from the 1st to the 2nd General Assembly after the U.S. Census of Population is, for the 1st and 5th bienna of each reapportionment period, in violation of the Equal Protection Clause of Amendment XIV-1 of the United States Constitution.

2. Whether for Illinois, elections of members of the General Assembly by the State at large abridges Illinois' Republican Form of Government guaranteed by the United States in Article IV-4, and abridges Illinois electors' right as United States citizens to a complete and equal ballot for this essential office, in violation of Amendment XIV-1.

3. Whether in Illinois, with its unique system of District Minority Representation, the Equal Protection Clause of Amendment XIV requires the equality of Legislators, or of Electors.

4. Whether the 9/9/1965 apportionment of Senate Districts should have included the provision for greater mathematical nicety in the equality of the representation of Electors rather than in the voting of the Senators.

STATEMENT OF THE CASE

Note: *Germano* v. *Kerner* challenged the validity of the Illinois 1955 Senate District under the Equal Protection Clause of our United States Constitution. The *People of the State of Illinois ex rel. Engle* v. *Kerner, et al.*, challenged not only the validity of the 1955 Senate Districts under this Equal Protection Clause, but the validity, under the Illinois Constitution, of the entire 1954 proclaimed amendment to Article IV of the Illinois Constitution of which these Senate Districts are a part.

This cause, *The People . . . Engle* v. *Kerner, et al.*, presents for the first time before the bar of this Court, the Illinois plan for equalizing representation. This plan would not only automitacally and almost perfectly equalize representation, but it would vitalize it and obviate political party gerrymandering. It would use the century-old Illinois System of District Minority Representation by which each district sends three Representatives to the General Assembly, but to which is added the provision that each such Representative votes his own election returns when voting on the legislative decisions of the whole House, the decision turning on majorities of the total of the State's electors who voted for the elected Representatives.

The Illinois System of District Minority Representation began with the Constitution of 1870. In the Constitution Convention of 1869-70 Delegate Joseph Medill (editor of the Chicago Tribune) had proposed it for both the Senate and the House of Representatives as a means for breaking a deplored sectionalism that had developed in the 1960's by southern Illinois electing only Democrates and northern Illinois electing only Republicans, and the minorities in both sections feeling un- or mis-represented. The Con-

vention shied away from this novelty for either house but permitted it to be submitted to the electors as an alternative proposal. The People adopted what the convention was too timid to propose and have retained it for almost a century.

It accomplished its original purpose for it has enabled any minority that exceeded 25 per cent of the district's vote to elect a Representative. But in practice it has effectively disfranchised the electors for this office in the November elections. In half or more of the districts only three candidates are nominated so that after the first vote for this office, how or whether subsequent electors vote makes no difference whatever in the result. In the other districts the electors are compelled to accept 3 or 4 nominees which is almost as bad. Equality of representation *as between districts* depends (as it does in other systems), on an impossible equality of district populations. The vexations of decennial re-gerrymanders prevail.

In 1910, Illinois in its Primary Election Law, required political party Committeemen to vote the number of ballots cast by their party in their district in the preceding Primary. In 1964, Illinois required the Delegates in the Party Conventions nominating candidates for Representatives in the General Assembly to be elected by the State at large, to use a vote weighted by the number of their party's votes for Representative in their district in the preceding election.

Since the 1950 Census this Relator has been suggesting the equalization (and vitalization) of representation on the legislative decisions of the whole House, by each Representative voting his own election returns, decisions being, not by majorities of electors elected, but by majorities of the total number of the State's electors who voted for the

elected Representatives. The resulting equality and vitality of electors' votes for this office in place of their present meaninglessness would be, not only desirable, but it is required by the Equal Protection Clause of our United States Constitution.

The 1953 General Assembly waited for "the Governor's plan" which was not drafted until the last few days of the session. By this plan, 58 Senate districts were to be frozen into the Constitution with 24 apportioned to Cook Couty (18 of them in Chicago) while the rest of the State with less than half of the State's population, would have 34 Senate Districts, a majority of 10. Although the new Senate District were not to be changed except by amending the Constitution, they were not to be apportioned until 1955, after the amendment had been adopted. This was an attempt to evade the stating and publishing "in full" requirements of the Amendment Article.*

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* Article XIV, Section 2 of the Illinois State Constitution since 1870 has this requirement: "2. Amendments to this Constitution may be proposed by either House of the General Assembly, and if the same shall be voted for by two-thirds of all the members elected to each of the two houses, such proposed amendments, together with the yeas and nays of each house thereon, shall be entered in full on their respective journals, and said amendments shall be submitted to the electors of this State for adoption or rejection. . . . Each proposed amendment shall be published in full at least three months preceding the election."

The Governor's Plan proposed 59 Representative districts as nearly as practicable to 1/59 of the State's total population, separately apportioned in (1) Chicago, (2) the rest of Cook County, and (3) by county units in the rest of the State. Apportionments were to be by the second General Assembly after the decennial U.S. Census of Population, or by a Governor's Commission. If this failed there is to be an election of Representatives by the State at large, which in practice can be forced whenever the political power in control of the Governor, or either house of the General Assembly decides to gamble on winning it.

This case originated as a challenge to the validity under the Illinois State Constitution, of the 1954 proclaimed amendment to Article IV for the attempted evasion of the stating and publishing "in full" requirements in the procedures for proposing amendments. The Illinois Supreme Court failed to rule on this issue (see Dissent of Justices Schaefer and Hershey, Judicial Statement, Appendix D, p. 20, App. 22), but 1) accepted the ruling of *Reynolds* v. *Sims*, 327 US 533 as applied to *Germano* v. *Kerner, et al.*, holding the Illinois 1955 permanent Senate Districts in violation of the Equal Protection Clause of Amendment XIV of our United States Constitution; 2) held that the remainder of the 1954 proclaimed amendment was separable and valid; and 3) retained jurisdiction to insure valid elections in 1966 and until the 1970 census figures are available for legislative action (Judicial Statement, p. App. 17, 37).

The People . . . Appellants, then, by motion, challenged the validity under our United States Constitution, of certain of the remaining features of the 1954 proclaimed amendment to the Illinois State Constitution which the Illinois Court had held separable and valid. All these motions the Illinois Supreme Court denied, one without prejudice, all without comment. These, the People . . . Appellants now appeal to the Supreme Court of the United States.

ARGUMENT

Introduction and Summary

This is an appeal from the Illinois Supreme Court's rulings that in at least four instances permit practices that abridge our Republican Form of Government and violate the Equal Protection Clause of our United States Constitution, namely,

1. The 1954 proclaimed change in the Illinois Constitution which mandatorily and unnecessarily delays decennial reapportionments by two years thus making the 1st and 5th biennia, 40 per cent of each decade, to be in violation of the Equal Protection Clause of Amendment XIV.

2. In such a large state as Illinois, the election by the State at large of 177 Representatives from 236 candidates, abridges electors' rights as United States citizens in a Republican Form of Government to a complete and equal ballot.

3. Illinois Electors are denied their right to a meaningful vote for Representatives in the General Assembly by interpretations of Illinois Constitution's provisions that unnecessarily protect the equality of *Representatives* votes rather than the equality of *Electors* votes, in violation of the Republican Form of Government and the Equal Protection Clause of our National Constitution.

4. The Illinois Supreme Court in its 9/9/1965 apportionment of Senate District failed to comply with the Equal Protection Clause, by protecting the equality of Senators' voting with mathematical nicety, and refusing to consider the equality of electors' voting on the grounds that mathematical nicety is not constitutionally required.

The Supreme Court of the United Sta[illegible] adopted a case by case policy in evolving standar[illegible] permissible deviations from the equality required by the Equal Protection Clause (*Reynolds* v. *Sims*, VI). Implicit in all previous cases, is the unstated but assumed premise that all legislators vote equally, which carries the corollary that the votes of the electors represented are weighed by the ratio of the Average to the Actual district populations. In this Cause, The People . . . Appellants hold that in Illinois, with its system of District Minority Representation, the Equal Protection Clause of our United States Constitution requires the equality of *Electors* votes rather than that of *Representatives*, even to the extent of weighing each Representatives votes on legislative decisions by the number of Electors voting for him, *i.e.*, by his own election returns. This ensures automatic and almost complete equality. At present only Illinois can do this. In Illinois the alternative is either this, or effective disfranchisement of Electors for this office in the November elections.

I.

IN THE 1954 PROCLAIMED AMENDMENT TO ARTICLE IV OF THE ILLINOIS CONSTITUTION, THE MANDATORY AND UNNECESSARY TWO-YEAR DELAY IN DECENNIAL REAPPORTIONMENTS VIOLATES THE EQUAL PROTECTION CLAUSE OF OUR UNITED STATES CONSTITUTION FOR THE FIRST AND FIFTH BIENNIA, 40 PER CENT, OF EACH DECADE, AND IS THEREFORE INVALID.

On 22 March 1965, four days after their petition for a rehearing was denied, The People . . . Appellants presented this motion:

MOTION.

Now comes Robert H. Engle, Relator, *pro se,* and respectfully moves that the Supreme Court of Illinois, in its opinion in the above titled cause, Agenda 23, January 1965, filed 4 February, jurisdiction retained, specifically includes as an additional invalid feature of the 1954 proclaimed amendment to Article IV of the Illinois Constitution, the date "1963 and every 10th year thereafter" in Sections 7 and 8. This is a mandatory and unnecessary delay in the decennial reapportionments until the second General Assembly after the "lame duck" apportionments for as long as 14 years after the date of the census on which it is based.

This is clearly invalid by Article II Section 18 of the Illinois Constitution as well as by *Baker* v. *Carr,* 369 US 186, *Reynolds* v. *Sims,* June 1964, and *Germano* v. *Kerner,* June 1964. Instead of thus mandatorily delaying reapportionments, re-equalizations of representation should be made as soon as practicable. For 85 years after 1870 this was the duty of the first General Assembly after the decennial U.S. Census. With the current increasing efficiency in data processing, there are sufficient Census data available for the first General Assembly to make an equitable apportionment.

/S/ *Robert H. Engle,*
17 March 1965

Received three copies of the above Motion this 22 day of March 1965.

/S/ *L. Gunnels*

Received three copies of the above Motion this 22 day of March 1965.

/S/ *William G. Clark,*
Attorney General

From 1870 to 1954 the first General Assembly after the U.S. Census of Population had the duty to re-apportion the State for General Assembly districts. The population data for 1960 "by political boundariees and enumeration districts were available in July 1960". The reports for the 1970 Census, by improved data processing, are expected by the Census Bureau to be as much as three months earlier than they were for 1960. The first General Assembly after the 1970 Census and the Assemblies each 10th year thereafter will be in session 9 to 15 months after the date of the enumeration and certainly will have all the data they need to make the required reapportionment.

Unless the 1971 instead of the 1973 General Assembly, and those of each 10th year thereafter make the apportionments, the first and fifth biennia of each reapportionment period will be in violation of the Equal Protection Clause of our United States Constitution. This mandatory delay is clearly unconstitutional and should be invalidated along with the Senate Districts based on area, of the same 1954 proclaimed amendment invalidated in *Germano* v. *Kerner,* in the *Reynolds* v. *Sims* group of cases.

II.

IN ILLINOIS, ELECTIONS BY THE STATE AT LARGE OF 177 REPRESENTATIVES FROM 236 CANDIDATES, UNCONSTITUTIONALLY DEPRIVES ELECTORS OF A COMPLETE AND EQUAL BALLOT FOR THIS OFFICE.

1. The statistics alone of Illinois' large size: 380 miles long, 200 miles wide, over 56,000 square miles in area, over 10,000,000 in population, half of it in Cook County, the other half in urban and rural patterns covering the rest

of the State, show the appropriateness of electing its legislature *by districts* and the inappropriateness of trying to do so by the State at large, its impracticability, and even impossibility. Experience amply confirms this conclusion.

2. Districts are basic to the design of the Illinois System of District Minority Representation including cumulative voting by electors. These were the first victims of trying to elect representatives by the State at large. Legislators and Judges nullified the plain language of the Illinois Constitution and substituted their own speculations about the people's intention to say something else.* District representation and cumulative voting are essential to the representation of large significant groups of Illinois citizens who formerly elected Representatives. But merged with the State at large, these are hopelessly swamped and unable to elect a voice, thus reducing representativeness.

3. The experience of the 1964 election of Representatives by the State at large shows the improbability of any of the 236 candidates canvassing the entire state, as electors need, expect, and get from candidates for Governor, United States Senator, and any other officer elected by the

---

* "In all elections of Representatives aforesaid, such qualified voter may cast as many votes for one candidate as there are Representatives to be elected, or may distribute the same, or equal parts thereof, among the candidates as he shall see fit; and the candidates highest in votes shall be declared elected." (the Illinois Constitution, last sentence in Section 7 of Article IV, 1954 proclaimed amendment and unaltered since 1870).

State at large. No candidates for Representative even claimed to have canvassed the entire State in 1964, including Representatives Stevenson and Eisenhower.

4. Although the Illinois Constitution provides for cumulative voting in the election of State Representatives, the 1964 Special Session of the General Assembly amended the election code to limit the counting of votes to one each, thus requiring the elector to mark for 177 candidates in order to exercise his full voting right for this office. Even if an elector marked the party circle for the entire slate of 118 party candidates, he had to mark for 59 and no more other candidates to use his full voting right for this office. To vote against a single undesired candidate in his party group he had to mark individually for 177 candidates—and no more. Few wanted thus to aid the opposite party to a 2/3 majority and almost none would be able to mark all 59 individual votes in the time permitted for voting. If there were any who actually voted for any combination of 177 candidates, they were not numerous enough to make inappropriate the assertion that experience shows the great difficulty and practicable impossibility of doing so. This abridges the electors' rights as United States citizens in a Republican Form of Government, to a complete and equal ballot and denies them rights protected by Section 1 of Amendment XIV of our United States Constitution.

III.

IN THE ILLINOIS SYSTEM OF DISTRICT MINORITY REPRESENTATION, (THREE REPRESENTATIVES ELECTED FROM EACH DISTRICT BY CUMULATIVE VOTING), EQUALITY OF ELECTORS' REPRESENTATION DEPENDS ON EACH REPRESENTATIVE VOTING HIS OWN ELECTION RETURNS ON THE LEGISLATIVE DECISIONS OF THE WHOLE HOUSE, DECISIONS TURNING ON MAJORITIES OF THE TOTAL NUMBER OF THE STATES' ELECTORS VOTING FOR THE REPRESENTATIVES ELECTED, SO THAT EACH ELECTOR IS COUNTED, AND MAKES AN EQUAL MEASURED DIFFERENCE IN THE VOTES OF THE REPRESENTATIVE FOR WHOM HE CASTS HIS BALLOT.

1. This would comply with the Equal Protection Clause of our United States Constitution and wth Section 11 of Article IV of the Illinois State Constitution which requires each legislative decision to aver that it is enacted by the *People,* in an enacting clause reading: "Be it enacted by the People of the State of Illinos represented in the General Assembly". The representation of every elector, by this proposal, would be equal to that of every other elector in the State, and every legslative decision of the House would be by the required majorities of all "the People of the State of Illinois" as measured by their electors, *i.e.* all the voting people of the State.

2. In contrast to "One elector, one vote", the present practice of One *Legislator,* one vote" results in the effective disfranchisement of the electors for this office in the

November election, in those districts (about half of the total) that nominate only three candidates for Representative. After the first ⅓ vote for each candidate (and a few to counter rare write-ins), how or whether any other elector votes, makes no difference whatever in the result. In the remaining districts, where four candidates are nominated, the electors are compelled to accept 3 out of 4 candidates, which is almost as bad.

3. Under "One Legislator, one vote", regardless of the number electing each one, electors' preferences are disregarded. When each Representative votes his own election returns, electors can increase the voting strength of an approved Representative and reduce that of a rascal. Each elector would have the choice of three Representatives and a way to make his choice effective.

4. Under the "One Legislator, one vote" rule, electors' votes for this office have become so meaningless, that in a recent state bond referendum, which, to pass, had to get a majority of the State total number of votes for Representatives, proponents publicly urged electors to double their vote for the bonds in the districts where only three candidates for Representative had been nominated (over half of the State), by voting for the bonds and not voting for Representatives. Electors in other districts could "vote twice" for the bonds if they were not interested in an election of Representatives where they were compelled to accept 3 of the 4 candidates. Such a meaningless, pseudo "election" is repugnant to a Republican Form of Government, and abridges the right of a United States citizen to a meaningful ballot for this important office.

On the other hand, the "One *Elector*, one vote", replacing the "One *Legislator*, one vote" rule, would change the electors' votes for this office from an empty gesture

to an act of great meaningfulness and vitality. The district communities would have an interest in getting out their maximum vote and in the honesty of these elections in the whole State. In each district all candidates would benefit by a maximum vote, the share of each depending on his own vote-getting ability.

5. Under the present "One Legislator, one vote" rule, each district group of electors is of course necessarily weighted, with mathematical nicety, by the ratios of the Average to the Actual district populations. Thus protecting the equality of Representatives rather than the equality of the represented is a violation of the Equal Protection Clause *in Illinois* where the "One Elector, one vote" rule is so patently practicable.

6. Under the "One Elector, one vote" rule, the Equal Protection Clause would be complied with, automatically and almost perfectly, regardless of the imperfections of apportionments populationwise. Re-equalizations would occur, not just once in 10 years, but at every 2-year election of Representatives.

7. The reapportionment problem is further simplified by the elimination of political party gerrymandering. Each political party's strength would depend on the total State vote for its candidates, not on the location of the district boundaries.

8. The Republican Form of Government and the Equal Protection Clause of our United States Constitution require that, in the Illinois House of Representatives elected by the Illinois Plan of District Minority Representation, legislative decisions of the whole house by "majorities of members elected" be interpreted to mean "majorities of all the States electors who voted for the members elected",

each Representative voting his own election returns. Otherwise, equality of Representatives' votes disfranchises Illinois elector for this office in the November elections, violates the Republican Form of Government and rights protected by Amendment XIV-1 of our United States Constitution, and the essence of Section 11 of Article IV of the Illinois State Constitution.

IV.

THE 9/9/1966 ILLINOIS SUPREME COURT OPINION AND APPORTIONMENT OF SENATE DISTRICTS WERE IN ERROR IN ASSERTING THE REYNOLDS v. SIMS DICTA, "MATHEMATICAL NICETY, IS NOT A CONSTITUTIONAL REQUISITE", AND "MATHEMATICAL EXACTNESS OR PRECISION IS HARDLY A WORKABLE CONSTITUTIONAL REQUIREMENT", PRECLUDE THE ADOPTION OR CONSIDERATION OF THE ILLINOIS SYSTEM OF DISTRICT MINORITY REPRESENTATION APPLIED TO THE ILLINOIS SENATE, INCLUDING EACH SENATOR VOTING HIS OWN ELECTION RETURNS ON THE LEGISLATIVE DECISIONS OF THE WHOLE SENATE, DECISIONS TURNING ON ATTAINING THE REQUIRED MAJORITIES OF THE TOTAL STATE VOTE OF ELECTORS FOR THE SENATORS ELECTED.

1. Apportionments for the elections of Senators in 1966 and 1970, on the basis of populations of 1 April 1960, even with low or zero deviations from equality, form districts that will be unequal in 1966 and 1970, to the extent of the relative changes in populations since 1 April 1960.

A surer way, and the only way so far suggested, of achieving the equality of representation required by the Equal Protection Clause of Amendment XIV for the elec-

tion of Illinois Senators in 1966 and 1970 is to adopt for the Illinois Senate the Illinois System of District Minority Representation as used for the Illinois House of Representatives, and adding the provision that on the legislative decisions of the whole Senate, each Senator votes his own election returns, decisions being by required majorities of all the electors of the State who voted for the elected Senators.

For Illinois, with (1) its century of experience with District Minority Representation, and (2) over a half century of experience with appropriately weighting political party Committeeman by their electors, and (3) the 1964 example of the Delegates in the Representatives Nominating Convention, required by law to use votes weighted by their District's electors in the preceding election of Representatives, this closer approach to the equality required by the Equal Protection Clause is normal, expected, and required.

V.

CONCLUSION AND DESIRED RELIEF.

The People of the State of Illinois by this Relator, Plaintiff-Appellants, respectfully request that the Supreme Court of the United States declare and order that:

1. In the 1954 proclaimed amendment to Article IV of the Illinois Constitution, the mandatory delay of decennial reapportionments from the first to the second General Assembly after the United States Census of population, is a violation of the Equal Protection Clause of our United States Constitution and is therefore invalid.

2. For Illinois, the election of members of the General Assembly by the State at large abridges the rights of United States citizens in a Republican Form of Government to a complete and equal ballot for this important office,

and therefore is an invalid attempt to comply with the Equal Protection Clause. Illinois has used more appropriate ways to secure equality of representation.

3. The Republican Form of Government, and rights of citizens of the United States and of Illinois protected by Amendment XIV of our United States Constitution, require that the Illinois System of District Minority Representation include the interpretation that legislative decisions of the whole House be by the required majorities of the number of electors in the whole State who voted for Representatives elected, on these decisions, each Representative voting his own election returns.

4. The Illinois Supreme Court's 9/9/65 apportionment of Senate Districts is not, for Illinois, a compliance with the Equal Protection Clause for the State Senates to be elected in 1966 and 1970.

The Equal Protection Clause is not a protection of the equality of *Legislators'* votes, but it does require, as close as may be, the equality of their *Electors'* votes, even to the extent of using the Illinois System of District Minority Representation including the weighting of each legislator's vote by his own election returns.

The 9/9/65 provision for an Illinois Senate is remanded to the Illinois Supreme Court for reconsideration in the light of this ruling and the proximity of the 1966 election.

Respectfully submitted,

ROBERT H. ENGLE, *pro se*,
People . . . Appellants v. Kerner,
No. 1067
5838 South Stony Island Avenue
312-363-4622.

PROOF OF SERVICE.

We have received a copy of the foregoing Brief on the Merits this ..... day of May, 1966.

.....

WILLIAM G. CLARK, *Attorney General*
For Kerner et al.

We have received a copy of the foregoing Brief on the Merits this ..... day of May, 1966.

.....

DON H. REUBEN, LAWRENCE GUNNELS
For Wm. J. Scott

END